JD–32–98
Atlantic City, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ATLANTIC LIMOUSINE, INC.

and

TEAMSTERS UNION NO. 331
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Cases 4–CA–21505,
4–CA–21552,
4–CA–21697,
4–CA–21740

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for the Respondent.

SUPPLEMENTAL DECISION

I. Statement of the Case

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on October 16, 1997. The parties agreed to terms for the closing of the record without the necessity of obtaining testimony from discriminatee Glen Gerrity, who was unavailable at the time of the hearing, and the record in the proceeding subsequently was closed by Order dated December 3, 1997. On January 16, 1995, both the General Counsel and Respondent filed briefs and by letter dated January 29 the General Counsel noted that discriminatee Glen Gerrity had five heart attacks by March 19, 1993 and stipulated that the backpay period for Gerrity should be cut off March 22, 1993, three days after the last onset of that illness.

This proceeding is based upon backpay specification dated May 28, 1997, enforcing the backpay provisions of the Board's Decision and Order dated March 24, 1995, 316 NLRB 822, which requires the Respondent to make whole discriminatees Louis Babich, Victor Jenkins, and Glen Gerrity, Joseph Pizzutillo and Henry Purcell for their loss of earnings and benefits resulting from Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

Upon review of the backpay specification, the Respondent's answer, the evidence stipulated to or presented at the hearing and the respective briefs, it appears that the primary issues are whether discriminatees Babich, Jenkins, and Purcell were available for work or failed to mitigate damages by not making an adequate search for work and whether the tip calculations for Jenkins and Purcell should be reduced.

II. Factual Background

Respondent operates a limousine service in and around Atlantic City, New Jersey. Its clients include casinos (casino contracts provide the bulk of its revenues), other business enterprises, and individual casino patrons and the discriminatee were all employed as limousine drivers. In the underlying unfair labor practice decision, the Administrative Law Judge found that "tips form an important part of a driver's compensation since each driver's base wage is only $2.38 an hour." Respondent itself also acknowledged that tips are the mainstay of the drivers' earnings and, in a document it gave to its drivers during the Union campaign it discussed what the Union was saying and stated:[1]

> In our case, Local 331 keeps harping on the number $2.38, like that is all you make an hour. You know that you make many times that if you factor in:
>
> a. your tips;
>
> b. the money we pay if a trip is canceled;
>
> c. the money you receive for waiting time;
>
> d. the money you receive if the tip is too low or you receive no tip at all. (No other company anywhere does this)
>
> h. Gratuities that we insist be added to all casino contracts for all employee and entertainer runs.

Tips are received when individual limousine patrons pay their fares directly to the drivers and generally tip in cash. Also, certain corporate and business clients have a contractual relationship with Respondent and are billed for limousine services with charges that include a pre-set gratuity for driver, which is distributed to the driver as a component of his next regular payroll check. Discriminatee Jenkins testified that this type of pre-set, contractual tip received in a driver's regular paycheck is known as a "tip on the bill." Leon Geiger has been the Respondent's general manager for 15 years and is familiar with the Employer's payroll records and documentation concerning wages and tips. Since 1988, it has been the Respondent's practice of the Employer to provide each driver a form entitled "Drivers Pay Information" and to require the employee to sign the document acknowledging that the employee understands the rates of pay, pay practices and pay procedures for drivers. This form advises employees that drivers are paid an hourly minimum wage rate with an additional one half of that hourly wage rate reported as income for tax purposes only. Thus the tip (a preselected value), is applied to the driver's salary for wage and hour calculations. Employees receiving in excess of $2.38 per hour in tip income purportedly are required to report such excess income to the Employer to be reported for income tax purposes. If an employee is tipped less than $2.38 per hour the Employer has directed employees to report this to the Employer and the Employer will add the difference to their pay check in order that the Respondent may comply with federal tax requirements. Employees complete time sheets indicating the trips driven and the hours worked and employees are directed to report cash tips received in excess of $2.38 per hour on the bottom of the time sheet. Since 1992, it has been the Employer's practice to "require" all employees to sign weekly tip declarations forms. If a driver is assigned a run under a company

[1] In accordance with the General Counsel's request, I take official notice of General Counsel's Exhibit No. 20 and 11 from the underlying proceeding.

or casino contract the built-in gratuity is given to the employee through his regular pay check. The Employer adds this built-in gratuity to the right hand column of the driver's time sheet and drivers are advised never to report cash tips received in excess of one half the minimum wage in the right hand column of the time sheet. Those amounts assertedly are reported on the tip declaration report and signed weekly by drivers. These tips are also included on the weekly payroll register and on the employer pay stubs.

The employer provided payroll records for 1992 and 1993 to the Regional Office showing a wage rate for drivers consisting of $2.38 per hour in wages and $2.37 per hour in tips, plus higher earning rates for overtime hours. The payroll records and the W-2s for those years also reflect tips paid them and reflected in the weekly tip declaration report. If a driver disagrees with the tip deduction form, they are instructed not to sign it and report the discrepancy to management so that it can be resolved by credit card and any additional tips declared by the employees to the Employer.

Victor Jenkins began working for the Respondent in January 1992 and he suffered an unlawful reduction in his hours between March 28 and April 25, 1993. The Respondent does not dispute the backpay claim for this period as set forth in the Compliance Specification. Jenkins also was unlawfully discharged on May 31, 1993, and he is entitled to backpay from that date until he declined a valid reinstatement offer on January 17, 1994. The Compliance Specification cites weekly tip earnings of $360 for the period following discharge, while Respondent contends that the figure should be $158.

Jenkins testified that, prior to his discharge, he worked six days per week for Respondent and that he earned an average of $450 per week in cash tips. In the underlying unfair labor practice proceeding (either during the investigation stage in 1993 or the 1994 trial), Jenkins provided the Regional Office with a copy of a tip record from his last week of employment with Respondent, the week of May 17 to 23, 1993. He testified in the Compliance hearing that this document was completed on a daily basis over the course of that last week of work. This document shows tip earnings for eleven trips with individual customers ranging from a low of $10 for a 13 mile trip to a high of $80 for a 160 mile trip, totaling $430 in cash tips for that 6-day work week. Jenkins testified that during the week prior to this discharge, manager Carl Geiger asked him how much money he made per week and when Jenkins answered "About $600." Geiger said that it "sounded about right." The report actually submitted to the Employer for that period indicated no cash tips and Jenkins did not submit his time sheet for that week. Rather, the tip declaration sheet for that same week signed by Jenkins indicated a total of $130 in tips.

Jenkins testified that he searched for work by various means, such as newspaper ads, walking into businesses to apply for work, and networking or asking people if they knew of any positions available. He also sent out resumes and applied in person at several competitors' limousine services, including Enchantment, and Jonathan's Limousine Service, as well as at the Trump, Harrah and Showboat casinos. Jenkins also searched for work in the field of human resources and visited human resources department at the casinos and elsewhere seeking employment opportunities and/or leads for jobs. Mr. Jenkins testified that he expected to get another job as a limousine driver quickly and when he didn't, thought that he might be "blackballed." At the end of June after he became unemployed Jenkins' mother, suffering the effects of strokes, came to stay with him. He asserts that he continued to search for work and to be available for work while she was with him. He also said it would have been "real difficult" to do both but testified that he then was available "mostly at night" because of his mothers day time care needs. Jenkins thereafter found and accepted full time employment in mid January, 1994, while his mother was still in his home.

Henry Purcell worked for the Respondent August 1992 to April 1993. The Compliance Specification sets forth a backpay period for Purcell between his unlawful discharge on April 23, 1993 and January 17, 1994, when he declined reinstatement. Respondent does not contest these dates but contends that Purcell made an inadequate search for interim work and it also contends that the tips set forth in the Specification should be reduced.

The Compliance Specification assert that Purcell is entitled to $325 per week in tip earnings for the backpay period. Purcell testified that he normally earned from $50 to $80 a day in tips, primarily in cash, which he concededly did not report to the Internal Revenue Service. Respondent's Answer contends that Purcell should receive $115 in tips based on his tax records.

Purcell testified that he began to search for work "soon after" his late April discharge by responding to newspaper ads and making personal visits to apply for work, mainly as a driver. He also signed up for training at the unemployment offices and was always available for his regular work (he had one short term job during the summer of 1993). Purcell testified that he kept calling back to named casinos on a regular basis looking for work as a driver. He applied at the Tropicana and checked back every week until he was eventually hired in 1994 and where he was still employed at the time of the hearing.

The Compliance Specification alleges that Louis Babich is entitled to backpay for the period February 26, 1993 to January 17, 1994. Babich testified that upon his termination, he started to drive a taxi in Atlantic City, New Jersey and did not apply for work with any other employer. He further testified that he started his own business in April or May of 1993.

The Specification shows that Babich has interim earnings totaling $8,927.29, which diminishs the gross backpay owed by Respondent by nearly half. The spread of the interim earnings over the backpay period indicates that his earnings increased over time and there is no backpay claim for the fourth quarter of 1993 (and there is no "tip" issue regarding Babich).

The unfair labor practice decision found that Glen Gerrity's hours were unlawfully reduce for the two weeks ending February 28 and March 7, 1993 and that he was unlawfully discharged on March 7. The specifications asset a back pay period continuing until April 25, 1993 and tips at $300 per week, however the Respondent claims that the correct tip amount is $126 per week. As noted above, because of Gerrity's heart condition the General Counsel now stipulates a cut off date of March 22, three days after he was incapacitated. It otherwise is show that Gerrity usually required working fifty to sixty hours per week and that he worked for the Respondent much of 1992. His 1992 Federal Tax Return indicates Gerrity earned a total of $18,773 in wages: including $3,295 in unemployment benefits.

III. Discussion

It is well established that the only burden on the General Counsel in a backpay proceeding is to show the gross amount of backpay due, and that the finding of an unfair labor practice presumes that some backpay is owed, see, *Hacienda Hotel and Casino*, 279 NLRB 601 (1986).

Here, the Respondent does not challenge the backpay computation except to the extent the specifications list asserted additional tip income for Gerrity, Jenkins and Purcell, however, it otherwise questions their availability for work or reasonable efforts to find work.

As stated by the Board in *Fair Fashions*, 291 NLRB 586 (1988):

> A discriminatee is required to make a reasonable search for work in order to mitigate loss of income and the amount of backpay. *Lizdale Knitting Mills*, 232 NLRB 592, 599 (1977). The Board and the courts hold however, that in seeking to mitigate loss of income a backpay claimant is "held. . .only to reasonable exertions in this regard, not the highest standard of diligence. . .The principle of mitigation of damages does not require success, it only requires an honest good faith effort. . ." *NLRB v. Arduini Mfg. Co.,* 394 F.2d 420, 422-423 (1st Cir. 1968); *NLRB v. Madison Courier*, 472 F.2d 1307 (D.C. Cir. 1972). The Board and the courts also hold that the burden of proof is on the employer to show that the employee claimant failed to make such reasonable search. *NLRB v. Midwest Hanger Co.*, 550 F.2d 1101 (8th Cir. 1977), or that he willfully incurred loss of income or was otherwise unavailable for work during the backpay period. *NLRB v. Pugh & Barr, Inc.*, 231 F.2d 588 (4th Cir. 1956); *NLRB v. Miami Coca Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966). Moreover, in applying these standards, all doubts should be resolved in favor of the claimant rather than the respondent wrongdoer. *United Aircraft Corp.*, 204 NLRB 1068 (1973).

What constitutes a good faith search for work depends on the facts of each case and, in this regard the Board stated:

> that in broad terms a good faith effort requires conduct consistent with an inclination to work and to be self supporting and that such inclination is best evidenced not by a purely mechanical examination of the number or kind of applications for work which have been made, but rather by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment. Circumstances include the economic climate in which the individual operates, his skill and qualifications, his age, and his personal limitations.

In *Madison Courier, Inc.,* supra, the Court also stated at page 1318, that:

> In order to be entitled to backpay, an employee must at least make "reasonable efforts to find new employment which is substantially equivalent to the position [which he was discriminatorily deprived of] and is suitable to a person of his background and experience.

Here, discriminatee Babich obtained employment as a taxi driver, which is a substantially equivalent position to the position of limousine driver that he held with the Respondent. The specifications for Babich, who was offered reinstatement on January 17, 1994, are as follows:

	WKS/QTR	AVG WKLY ERNGS	GROSS BACKPAY	INT. ERNGS	NET BP
IQ 93	4.6	$566.16	$2,604.34	$0.00	$2,604.34
2Q 93	13	$566.16	$7,360.08	$1,353.00	6,007.08
3Q 93	13.2	$566.16	$7,473.31	$7.085.60	387.71
1Q 94	2.2	$56.16	$1.245.55	$488.69	$756.99
TOTAL					$9,755.99

As can be seen above, the interim employment that Babich obtained did not immediately reach the level of earnings he enjoyed with the Respondent. It is well established, however, that once a discriminatee has embarked on a legitimate course of interim employment, there is no duty to search for more lucrative interim employment, nor to engage in the most lucrative interim employment. See, *F.E. Hazard, LTD.*, 303 NLRB 839 (1991). Otherwise, the earnings were almost equivalent by the last quarter of 1993, when his own business had become established. Under these circumstances, I find that Babich's interim employment as a tax driver did not constitute willful failure to mitigate his losses, and, I conclude that Respondent has failed to meet its burden to establish that did not make reasonable efforts to find substantially equivalent interim employment.

Discriminatee Gerrity suffered a fifth heart attack at some time on March 18, 1993, (a Thursday) and it was stipulated by the General Counsel that the backpay period should toll March 22, 1993, a Monday. The pertinent specifications for Gerrity therefore would be as follows:

WKS/QTR	HOURS	HRS/WK	WAGE/HR	BCKPY	TIPS/WK	TIPS	GR BCKPY	NET BP
REDUCED HOURS 1Q 93								
w/e 2/28	Reg.	1.68	$2,38	$4.00	$70.20	$120.31	$120.31	
	OT	9.40	4.91	46.11				
w/e 3/7	Reg.	10.93	2,38	26.01	129.00	201.12	201.12	
	OT	9.40	4.91	46.11				
DISCHARGE								
1Q 93	3.8 Reg.	37.93	2.28	343.04	300.00	818.25	818.25	
	3.8 OT	9.40	4.91	175.21				

The reduced hours amounts are not contested and because Gerrity was incapacitated a week after he was terminated on Wednesday March 10, 1993, I find that he is entitled to one week pay calculated at the weekly figures provided for a total gross and net backpay of $1,139.68. (Otherwise, I find that the tip claim of $300 is less than that asserted for Jenkins and Purcell and is reasonable, see the following discussion on the tip issue).

The backpay specifications for Jenkins show no interim earnings and asserted tip at $360 a week. Purcell's specifications show interim earnings only during the 3rd quarter of 1993 ($2,200.65), and asserted tips at $325, a week.

Admittedly, the discriminatees in this case did not report all of their tip earnings to the Internal Revenue Service, however, an admission of underreporting tips to the IRS does not preclude previously underreported tips from being considered and included in a backpay award. Accordingly, if the credible evidence otherwise establishs that the discriminatees received tips

in excess of those reported to the IRS, then the backpay will include such tips. See *Hacienda Hotel & Casino*, 279 NLRB 601 (1986) and Or*iginal Oyster House,* 281 NLRB 1153 (1986).

Here, the record supports an inference that the employer utilized a "fiction" that the employees accurately reported any tips received in excess of the pre-allocated amount designated by the Respondent. This "fiction" allowed the employer to have a record for governmental reporting purposes that would show its reliance on a reportable amount that would limit its responsibility for anacillany tax payments, while, at the same time, shifting the responsibility for the accurate reporting of additional tips to the drivers.

As pointed out by the General Counsel, employers also are responsible for payroll taxes and therefore the lower the reported earnings, the lower the employer's payroll tax liability. Here, the Respondent's witness acknowledged that there are various taxes to be paid by the Employer based on reported income. Like employees, employers who fail to report their employees' full earnings also can benefit from the underreporting and also have an incentive not to to disclose those earnings in full. Here, I find that the Respondent had such an incentive and in fact actually acknowledged in its memo to drivers during the Union campaign which stated that employees "make many times" their hourly wage when "tips" (and other items), are factored in. Accordingly, I find that both the employees and the Respondent had offsetting interest in underreporting actual tip income.

The Board does not condone such conduct, however, any denial or reduction in actual backpay because of this could undoubtedly frustrate the objections of the Act by undermining the deterrent effect fo the monetary burden imposed on wrong doer. Thus, the lack of a full backpay remedy would make employees who make less than minimum wage plus substantial tip income susceptible targets for employers who are tempted to frustrate the employees' exercise of their Section 7 rights, see *Airport Park Hotel*, 306 NLRB 857 (1992) at page 860. Here, the Respondent offers an estimate of tips at least half of that suggested in the specifications but otherwise does not explain how they were calculated. Otherwise, both Jenkins and Purcell testified that their tips were higher ($450 a week and $50 to $80 a day, respectively), than reported.

While the evidence is less than overwhelming, under these circumstances, I am not persuated that the compliances figures for weekly tips of $360 for Jenkins and $325 for Purcell are unreasonable or inaccurate. This is especially true, inasmuch as the record otherwise shows that Jenkins was recognized by the Respondent as being in the top 5 percent of its highest paid drives. The reported tips, relied upon by the Respondent, clearly are not an accurate reflection of the actual tip income received.

Accordingly, I find the discriminatees' testimony to be believable and I conclude that the General Counsel has established a sound and reasonable basis for the figures set forth in the Compliance Specification and I also find that as Respondent has failed to offer convincing evidence that tip earnings were lower.

Turning to the issue of the adequacy of the discriminatees' search for interim employment, I find that Jenkins testified credibly that be began searching for work immediately after his termination in May by visiting places where he thought he might get hired, checking the newspapers and "networking" in order to find employment. He specifically applied for driving positions at Enchantment Limousine, Jonathan's Limousine, Trump Castle Casino, Harrah's Casino, and Show Boat Casino. He sent out letters and resumes, answered a number of employment ads, and also sought other employment in the Human Resources field.

Jenkins had no interim earnings but I do not believe that his lack of success is indicative of a willful or unreasonable search for employment that was related to his concurrent utilization of his time while unemployed for the care of his mother. Both Jenkins and Purcell were contemporaneously searching for driver positions, which, as noted above, are substantially equivalent and suitable positions, and Purcell also was unsuccessful even in the absence of any tangential circumstance regarding his availability. I otherwise find that Purcell did find and accept a short term job as a truck driver (which is reflected in his interim earning under employment for Joule Technical Services), and I find that he made a reasonable search for work, including work at the Tropicana, where he was eventually hired in early 1994 and where he is still employed. While Jenkins efforts and availability may be less than impressive, his efforts were ultimately successful and, when he found full time employment in January 1994 after a little more than two full quarters of unemployment, he was able to make other arrangements for his mother's care. I therefore conclude that he was availabale for work during the backpay period and that he made a good faith effort and did not willfully incur loss of income.

I otherwise find that the Respondent has failed to meet its burden in this regard and I conclude that Jenkins and Purcell are entitled to receive the net backpay set forth in the specifications.

The specifications for Pizzutillo are not disputed and, under these circumstances, I further concluded that the gross backpay computations in the Backpay Specifications are the most accurate possible estimates of backpay and that Respondent has failed to establish any reasonable alternative basis for a diminution of damages. Accordingly, total backpay owed the discriminatee by Respondent, exclusive of interest, is as follows: Louis Babich - $9,755.99, Glen Gerrity - $1,139.68, Victor Jenkins - $22,507.74, Joseph Pizzutillo - $108.24, and Henry Purcell - $17,296.73.

ORDER[2]

On the basis of the findings and conclusions set forth above and pursuant to Section 10(s) of the Act, it is ordered that Respondent, its officers, agents, successors, and assigns, shall make whole each of the discriminatees by payment to each of them as follows: Louis Babich - $9,755.99, Glen Gerrity - $1,139.68, Victor Jenkins - $22,507.74, Joseph Pizzutillo - $108.24, and Henry Purcell - $17,296.73 plus interest in accordance with *New*

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Horizons for the Retarded, 283 NLRB 1173 (1987) minus tax withholdings required by federal and state law. [3]

Dated, Washington, D.C., February 26, 1998.

Richard H. Beddow, Jr.
Administrative Law Judge

[3] In accordance with *Hacienda Hotel & Casino*, 279 NLRB 601 fn. 4 (1986) a copy of this Supplemental Decision shall be furnished to the Internal Revenue Service.